Exelon Generation Company, LLC. and International Brotherhood of Electrical Workers, Local Union No. 614, AFL–CIO. Cases 4–CA–33787, 4–CA–33937, and 4–RC–20940

July 31, 2006

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On March 10, 2006, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party/Union both filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below, and finds that the election must be set aside and a new election held.

On May 5, 2005, an election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 325 for and 328 against the Petitioner, with no challenged ballots. The Union filed timely objections to the election and unfair labor practice charges alleging that the Respondent engaged in unfair labor practices during the organizing campaign and immediately after the election.

For the reasons stated in the judge's decision, we adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by threatening employee union supporter Robert Schlegel with job loss and by threatening employee union supporter Cynthia Curtin with loss of prior approval to take leave without pay to attend Board hearings pursuant to subpoena.[2] We further adopt the judge's conclusion that the Respondent violated Section 8(a)(3), (4), and (1) by requiring employee union supporters Curtin, Schlegel, and Jerome Dailey to use vacation time rather than unpaid leave to attend Board hearings pursuant to subpoena because they supported the Union.[3]

The judge sustained the Union's Objections 1, 2, 3, 5, 6, and 9 and recommended that the election be set aside and a new election be held.[4] We sustain the Union's Objection 1, finding that the Respondent threatened employees with changes in their work hours and shifts and with loss of flexible work hours if the employees voted for union representation.[5] We therefore find it unnecessary to pass on the remaining objections.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Exelon Generation Company, LLC., Limerick, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of their jobs because they supported the Union.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Schaumber finds it unnecessary to pass on the latter threat finding as the result would be cumulative.

[3] Members Schaumber and Kirsanow rely solely on an analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to find, in agreement with the judge, that the Respondent's requirement that union-subpoenaed employees take vacation leave or floating holidays to attend Board hearings was unlawful as it departed from past practice and was motivated by antiunion animus. Members Schaumber and Kirsanow do not pass on the judge's additional reliance on *Western Clinical Laboratory, Inc.*, 225 NLRB 725, 726 (1976), enfd. in pertinent part 571 F.2d 457 (9th Cir. 1978), in finding the violation.

Contrary to his colleagues, and in agreement with the judge, Member Walsh would rely on *Western Clinical Laboratory*, supra, in finding this violation.

[4] The Respondent has excepted to the judge's statement in his conclusions of law that he relied at least in part on the unfair labor practices to find objectionable conduct and to recommend setting aside the election result. The Union disclaimed any reliance on the unfair labor practice charges as a basis for overturning the election, as it acknowledged in its brief to the Board. Further, it is clear from the body of the judge's decision that he set aside the election based solely on the conduct alleged to be objectionable. We therefore correct the judge's language in his conclusions of law to eliminate any reference to the unfair labor practices as a basis for setting aside the election.

In addition, we have revised the recommended remedy to require that the Respondent make whole employees Dailey and Curtin by providing them unpaid leave in an amount equal to the vacation leave they were required to use, rather than by restoring the vacation leave as the judge ordered. The revised remedy accurately reflects what is needed to restore the status quo.

[5] Members Schaumber and Kirsanow agree that Limerick Shift Superintendent Peter Orphanos and Plant Manager Bryan Hanson engaged in objectionable conduct at meetings they held with employees in April, but find it unnecessary to pass on the remaining conduct alleged as objectionable under Objection 1.

(b) Threatening an employee with loss of prior approval to take leave without pay to attend Board hearings pursuant to subpoena because the employee supported the Union.

(c) Requiring its employees to use vacation time to attend Board hearings pursuant to subpoena because they supported the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its employees Cynthia Curtin and Jerome Dailey for any losses they may have suffered by the Respondent's discrimination against them, including providing them unpaid leave in an amount equal to the vacation time they were required to use to attend Board hearings pursuant to subpoena in 2004 and 2005.

(b) Preserve and, within 14 days of a request, or such additional time as

the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of unpaid leave due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Peach Bottom Atomic Power Station, Limerick Generating Station, and Outage Services Group facilities in Delta, Limerick, and Kennett Square, Pennsylvania, respectively, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 9, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Brotherhood of Electrical Workers, Local Union, No. 614, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. July 31, 2006

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with loss of their jobs because they supported the Union.

WE WILL NOT threaten an employee with loss of prior approval to take leave without pay to attend Board hearings pursuant to subpoena because the employee supported the Union.

WE WILL NOT require our employees to use vacation time to attend Board hearings pursuant to subpoena because they supported the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL make whole our employees Cynthia Curtin and Jerome Dailey for any losses they may have suffered by our discrimination against them, including providing them unpaid leave in an amount equal to the vacation time they were required to use to attend Board hearings pursuant to subpoena in 2004 and 2005.

EXELON GENERATION COMPANY, LLC.

Noelle M. Reese, Esq., for the General Counsel.
Karl A. Fritton, Esq. and *Jonathon R. Nadler, Esq.,* of Philadelphia, Pennsylvania, for the Respondent.
Nora H. Leyland, Esq. and *Jonathan D. Newman, Esq.,* of Washington, D.C., for the Charging Party

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on November 1–4, 2005. The charge in Case 4–CA–33787 was filed by International Brotherhood of Electrical Workers, Local 614, AFL–CIO (the Union) on March 24, 2005,[1] and an amended charge was filed on August 2, 2005. The charge in Case 4–CA–33937 was filed by the Union on June 9, 2005, and an amended charge was filed on July 29, 2005. The Regional Director for Region 4 issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on August 18, 2005. As will be set out in detail later, the complaint alleges that Exelon Generation, LLC. (Respondent or Exelon) has engaged in conduct in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). At the outset of the hearing General Counsel was allowed to amend the complaint. The Respondent has filed an answer to the complaint wherein it admits, inter alia, service of charges, jurisdiction, the Union's status as a labor organization, and the supervisory and agency status of Plant Manger Bryan Hanson, Supervisor John Moore, Manager Mark Crim, and Supervisor Robert Shorts. On November 23, 2004, the Union filed a petition to represent Respondent's facilities and pursuant to that petition, an election was held On May 5, 2005. The Union lost the election and thereafter filed objections to the election. On August 18, 2005, Region 4 issued its notice of hearing on objections to election, directing that a hearing be held on certain of the Union's objections. The Region also consolidated the hearing on objections with the two unfair labor practices involved herein.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in the generation of electricity at various locations throughout the United States, including the three facilities directly involved in this case. Involved are two atomic power generating facilities located in Limerick, Pennsylvania, and in Delta, Pennsylvania (the Limerick Generating Station and the Peach Bottom Atomic Power Station). Also involved is Respondent's Outage Services Group

[1] All dates are 2005, unless otherwise indicated.

in Kennett Square, Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS

A. Background

Exelon Generation Company is a unit of the Exelon Corporation, which was formed as a result of the merger of PECO Energy Company and UniCom Corporation (known as ComEd) in 2000. Exelon operates power plants across the U.S., including the two generation facilities which are involved in these cases. The facilities are known as the Limerick and Peach Bottom facilities and are located in Limerick and Delta, Pennsylvania, respectively. These two facilities are the only two nonunion facilities in the Exelon group of generation facilities. The Union also sought to represent Respondent's employees at its Outage Services Group in Kennett Square, Pennsylvania. The IBEW represents hourly employees at all of the other facilities within Exelon Generation, as well as a number of facilities in other divisions of Exelon Corporation. For many years, IBEW Local 15 has served as the collective-bargaining representative of all production and maintenance employees at the former ComEd (including at seven nuclear power generating stations in Illinois), and has been party to a collective-bargaining agreement with ComEd, and now Exelon. Production and maintenance employees at the Respondent's other nuclear power plants, Three Mile Island and Oyster Creek, are represented by IBEW locals 777 and 1289, respectively. During the Union's campaign at Limerick and Peach Bottom, Local 614 and Exelon completed negotiations on a first-time contract at Respondent's fossil-fueled generation plants in Pennsylvania (the Fossil contract), and the content of that contract became a point of substantial attention during the campaign.

The Petitioner in this case, IBEW Local 614, represents employees at other divisions of Exelon Corporation, including PECO Energy Transmission and Distribution and Call Center employees, and Exelon Generation production and maintenance employees at Exelon Mid-Atlantic Power, which is the Fossil division in the Philadelphia area. As noted earlier, the Union filed a petition on November 23, 2004, to represent Respondent's employees at the Limerick and Peach Bottom facilities and the preelection period spanned an approximate 5-month period. A hearing to determine the unit composition was held at the Regional offices beginning in mid-December 2004 and ending January 18, 2005. During the period of time between the filing of the petition and immediately following the election, Respondent is alleged to have committed certain unfair labor practices and to have engaged in other conduct which would constitute grounds for invalidating the election and holding a re-run election. The election was held on May 5, 2005, during which 653 valid votes were cast, with the Union losing the election by a 3-vote margin.

B. Alleged Unfair Labor Practices

Specifically, the complaint alleges that Respondent violated Section 8(a)(1) of the Act by on or about May 6, 2005, threatening an employee with loss of the employee's job because the employee was supporting the Union. It further alleges that on or about January 3, 2005, Respondent, by Bryant Hanson, threatened an employee with loss of Respondent's approval to take leave without pay to attend Board hearings on January 3 and 4, 2005, because the employee supported and assisted the Union.

The complaint further alleges that Respondent violated Section 8(a)(1), (3), and (4) of the Act, by:

> 1. On or about December 9, 2004, requiring is employee Jerome Dailey, against his wishes, to use vacation time while attending a Board hearing in Case 4–RC–20940 pursuant to a subpoena on December 10, 2004, January 3, 4, 12, and 18, 2005; and if he attended the hearing, on January 19, 2005.
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> 2. On or about January 9, 2005, requiring its employee Cynthia Curtin, against her wishes, to use vacation time while attending a Board hearing in the same case pursuant to a subpoena on January 3 and 4, 2005.
>
> 3. On or about January 17, 2005, requiring its employee Robert Mark Schlegel, against his wishes, to use vacation time attending this hearing pursuant to a subpoena, on January 18, 2005.

C. Facts and Conclusions Related to the Unfair Labor Practices

1. Overview of the representation hearings

The parties met as scheduled for the first day of the representation hearing on December 8, 2004. In preparation for the hearing, the Union sent out about 10 to 12 subpoenas to Respondent's employees. Having been subpoenaed by the Union to attend the hearing, radiation protection technicians[2] Robert Schlegel and Jerome Dailey sat behind International representative of the IBEW, Brian Brennan, and Union Attorney Nora Leyland, on the Union's side of the hearing room on December 8, 2004. On behalf of the Employer, Limerick Plant Manager Bryan Hanson and Peach Bottom Plant Manager Joe Grimes were present.

On December 8, 2004, no record testimony was presented because the parties negotiated all day which job classifications should be included and excluded from the bargaining unit. Having never worked for Exelon and generally unfamiliar with the day to day activities of the Limerick and Peach Bottom plants, Brennan relied on subpoenaed employees, such as Dailey, Schlegel, and Cynthia Curtin, to learn about job duties and responsibilities of the disputed job positions. Dailey and Schlegel knew about other job classifications because their jobs take them regularly to virtually every part of the plant.

Although the Union was prepared each day to present record evidence and testimony, the parties ultimately had off the record discussions on December 10 and a couple of other days in December 2004 to attempt to resolve a number of disputed positions. On December 10, Dailey and other subpoenaed witnesses discussed with the Union the eligibility and community-

[2] The parties agree that the radiation protection technicians and the health physics technicians are the same position. In this decision, only the name radiation protection technicians will by used.

of-interest issues related to clerks, secretaries, reactor operators, lead maintenance technicians, and lead instrumentation technicians. On December 17, 2004, the parties reached a stipulation agreeing to include roughly 22 job classifications and exclude other job classifications.

At the hearing, Respondent contended that both the lead maintenance technicians and reactor operators were supervisors within the meaning of the Act. Respondent presented its evidence first and had its witnesses testify concerning reactor operators on January 3, 4, and 6, 2005, and concerning lead technicians on January 11 and 12, 2005. Respondent concluded its case on January 12. On January 18, the Union presented its case and called Schlegel, Curtin, and four other witnesses to testify. Although the Union never called Dailey to testify, Dailey was prepared to testify and was present to testify if needed. As I will discuss further at the end of the section of this decision, because of the complexity of Respondent's operation, I believe and find it was necessary for the Union to have at least some knowledgeable plant employees present at each day of the representation hearing to adequately present its position in response to Respondent's contentions and evidence.

On March 31, 2005, the Regional Director issued a Decision and Direction of Election finding that the reactor operators were not supervisors, but that the lead maintenance technicians were supervisors. The unit found appropriate was as follows:

> All full-time Designers, HP Technicians, I&C Technicians, Chemistry Technicians, Equipment Operators, Reactor Operators, Maintenance Technicians, Utility Technicians, Material Coordinators, Quality Verification Technicians, NDE Technicians, plant clericals at Limerick Nuclear Generating Station (Chemistry: Administrative Clerk; Operations: Administrative Clerks; Radiation Protection: Administrative Clerk; Maintenance: Technical Clerk, Administrative Coordinator; Maintenance Planning: Administrative Coordinator; I&C: Administrative Coordinator; Business Operations: Administrative Clerks), and plant clericals at Peach Bottom Atomic Generating Station (Chemistry: Administrative Coordinator; Operations: Technical Clerk; Administrative Coordinator; Radiation Protection: Technical Clerk; Maintenance: Administrative Coordinator; Maintenance Planning: Administrative Coordinator; I&C: Administrative Coordinator; Business Operations: Technical Clerks), employed by the Employer at Peach Bottom Atomic Generating Station, Limerick Nuclear Generating Station and Outage Services (East), excluding all other employees, Lead Technicians, all other Administrative Clerks, Administrative Coordinators, Senior Administrative Coordinators and Executive Coordinators, Planners, all employees in exempt pay classifications, and all employees in the Security, Training, Regulatory Assurance, Nuclear Oversight and Human Resources Departments, office clerical employees, guards and supervisors as defined by the Act.

As noted above, the election was held on May 5, 2005.

2. Facts related to Respondent's requirement that employee Cynthia Curtin use vacation leave against her wishes to attend the hearings pursuant to her subpoena

Cynthia Curtin is employed as a reactor operator at Respondent's Limerick facility. She has worked for Exelon or its predecessor at Limerick for 23 years, and has been in her current job since 1993. She reports directly to her shift supervisor (Gene Pierce), who in turn reports to a shift manager (Mark Crim). The shift managers report to a shift superintendent (Pete Orphanos) who reports to the operations director (Chris Mudrick). The operations director reports to the plant manager (Bryan Hanson) who reports to the site vice president (Ron DeGregorio). In parentheses above are the names of the individuals who held the positions in Curtin's chain of command during material times in these proceedings.

Curtin testified that on December 28, 2004, she received a subpoena from the Union to appear at the representation hearing before the Region on January 3, 2005. On December 29, she took the subpoena to her shift manager, Mark Crim, and asked to take off the following Monday and Tuesday, days on which she was scheduled to work. She wanted to take the days off as time off without pay. Crim told her that he needed to talk to Orphanos and would get back to her. Her night shift ended and she left the facility. Crim called shortly thereafter and told her she could take the time off as vacation. Curtain objected to using vacation time as she wanted to save it for time she could spend with her family. She reiterated her desire to take time off without pay. Crim said he needed to talk to Orphanos and would call her back. According to Curtin, Crim called back and told her that Orphanos said they could work something out. She was at that point in time authorized to attend the hearing pursuant to subpoena taking time off without pay.

On January 3, 2005, she reported to the Board's Philadelphia office pursuant to the subpoena. She recognized Exelon employee Jerome Dailey and sat with him on the Union's side of the hearing room. Curtin was not called to testify on January 3. She had planned to testify about her job to help determine whether it would be in the proposed bargaining unit. Curtin took notes at the hearing and provided union counsel with information about her job relating to whether her duties were technical or supervisory in nature.

According to Curtin, near the end of the hearing day, Limerick Plant Manager Hanson asked her if that day were a scheduled day off for her. She answered, "No." Hanson then asked if she took vacation for the day. She replied, "no," adding that Crim and Orphanos had given her permission to attend the hearing taking time off without pay. According to Curtin, Hanson then said, "Well, I'll fix that." Curtin asked what he meant, and Hanson repeated, "I mean, I'll fix that." She said he made this comment in an angry tone of voice. The Union's attorney, Nora Leyland, was standing close by and asked Hanson if he were threatening Curtin, adding that he could not do that. Leyland then went to the employer's attorneys to report what had happened. Both employee Jerome Dailey and union representative testified about the event and completely corroborated Curtin's testimony in this regard.

Hanson testified about the January 3, 2005 hearing day. He recalled Curtin wanting to have a conversation with him and he

elected not to have such a conversation. This took place in the hall outside the hearing room. He felt that as he would be a witness on the issue of whether her job would be in the unit, it was not right to speak with her. Notwithstanding this concern, later on the same day, he asked her if she had been scheduled to work that day. She said she had, but upon receiving her subpoena, she had arranged with her supervisor to have another employee cover her shift. He testified that he said to her, "I'll fix that." Hanson recalls Brennan and the Union's attorney turning and asking him what he meant. He testified that he was surprised to learn that she had been subpoenaed and he had not been told of that fact in advance by supervision under him. He added that he meant that he will fix the fact that he was not notified that one of his employees had been subpoenaed to testify that day and that her shift had to be worked by another employee.

I totally credit Curtin's version of the events of January 3 over that given by Hanson. Her version is corroborated by Brennan's and Dailey's testimony, whereas only Hanson supported his version even though other of Respondent's representatives were present for the confrontation and could have testified. Moreover, Curtin's previously approved time off without pay was rescinded and she was required to take vacation time for the days she attended the hearing. The adverse action is fully consistent with her version of the events and totally inconsistent with Hanson's version. I find that Hanson's actions were motivated by union animus and for no other reason. As will be discussed later, no legitimate reason was ever proven for requiring union-subpoenaed witnesses to use vacation time rather than unpaid leave. Further, in another conversation with Curtin in April, Hanson again demonstrated animus by threatening Curtin with adverse action if the Union were to win the election. This conversation is detailed at a later point in this decision. I find that Hanson clearly threatened to take away Curtin's prior management approval of using unpaid leave for the day, and such a threat of an adverse employment action because of protected activities constitutes a violation of Section 8(a)(1) of the Act. See *Poly-America, Inc*., 328 NLRB 667, 669 (1999).

The following day, Tuesday, January 4, 2005, Curtin again attended the representation hearing. She again sat with the union representatives. Another reactor operator, Roger Devlin, sat with the Employer's representatives. Neither Curtin nor Devlin were called to testify that day. On Wednesday, Curtin again showed up at the hearing only to be told by Brennan that it had been cancelled for that day.

Her next scheduled work day was January 9, and when she reported to work that day she was told by Crim that he would talk to her later and she would not be happy about what he had to say. In the afternoon of January 9, she again spoke with Crim. He advised her he was bringing another supervisor in as a witness and told her she could bring someone. She took another reactor operator, Doug Nixon, as her witness. A meeting was held where she was told that as she did not testify at the representation hearing, she would be required to take vacation for the days she was there, but was also scheduled to work. Crim added that she could not take time off without pay unless all her vacation time had been used.[3] Crim also warned against giving company information to anyone and that future infractions of this policy would be punished.

Curtin testified that she was upset because she had had permission prior to going to the hearing to treat it as time off without pay. She told Crim that what he was doing was unfair and asked that he reconsider. Crim said that as she was upset, she should go home. She did as she was told and left work about 2 hours before her shift was scheduled to end. She was paid for the entire shift.

On the following day, January 10, Curtin was home. Crim called her and revised his statement to her about using vacation time, offering her the option to take a floating holiday. She replied that she wanted neither of his options, but rather wanted to take time off without pay. Crim advised that this was not an option and she chose to take vacation. For January 3 and 4, Curtin was charged with 24 hours of vacation time.

On January 18, Curtin again attended the representation hearing and on this day did testify about her job duties. January 18 was not a scheduled work day for Curtin.

Curtin gave her understanding of Respondent's leave policy. For a vacation, the employees filed vacation request forms. If the time off was for a very short period, the employee would simply ask their supervisor, who would talk to the shift manager and take into consideration the work load before approving or disapproving the request. The amount of vacation employees get is based on years with the Company. Curtin currently gets 200 hours a year, and can carry over 40-unused hours. They receive four 8-hour floating holidays, which cannot be carried over. She testified that employees used to get 40 hours' sick leave, but now receive 56. She believed that they could carry over 40 hours of sick leave.

She has taken unpaid time off to attend a company picnic in 2001 or 2002. Before this event employees schedule to work on the day of the picnic were told they could ask for time off to attend, taking either vacation of unpaid time off if the request were approved. She asked for time off without pay and was granted permission. She was not told on this occasion that she had to exhaust her vacation before unpaid time off could be used.

3. Facts related to employee Robert Schlegel being required to use vacation leave against his wishes if he attended the hearing pursuant to his subpoena

Schlegel is a radiation protection technician at the Limerick facility. His job involves radiation protection. He has held this position since 1987. Schlegel's immediate supervisor is Radiation Protection Supervisor John Moore. Moore reported to the Radiation Protection Manager Willie Harris who in turn reported to Plant Manager Bryan Hanson.

Schlegel became interested in Local 614 representing the Limerick employees in the spring of 2003. He spoke at the time with Brian Brennan and signed an authorization card. He then became an employee union organizer. In this role he got employees to sign authorization cards, answered their questions

[3] Curtain testified that this was the first time she had heard of such a policy.

about the Union and distributed union literature. He testified that he was required to wear a security badge on a lanyard around his neck. He added a "Union: Yes" button to the lanyard and wore it while working. He also wore a union cap and T-shirt to work. Fellow employee Jerome Dailey also wore union insignia to work.

In late November or early December 2004, Schlegel received a subpoena from the Union to appear at the representation hearing on December 8. Prior to that date, Schlegel spoke with HP Supervisor Bob Shorts. Shorts approached him in the HP break room and told him that if he planned on attending the hearing, he would have to use a floating holiday[4] or vacation time. Schlegel attended the hearing on December 8, but did not have a problem as it was not a scheduled work day. He did not attend any of the following sessions which conflicted with his work schedule because he did not want to use his vacation or floating holidays. He saves those days to be able to have time to take his children to doctor visits and physical therapy needed by one of them. Schlegel testified that he would have attended more sessions if he could have taken time off without pay. He testified that he did attend some of the December session devoted to negotiating a stipulation, advising the Union about various jobs to help determine whether they should be in the unit. He also attended one of the January sessions and listened to the testimony.

Schlegel had a second conversation with Shorts before Christmas 2004, again in the HP break room. Shorts approached him and told Schlegel that if he planned on attending the hearings in January, he would need a new subpoena and reiterated that he would have to use a floating holiday or vacation.

Schlegel did testify in the hearing on January 18. He had worked the night shift of January 17–18 and left work at 5:30 a.m. Prior to this he had spoken with the Union's attorney about getting permission to take off this shift without pay so that he could safely attend the hearing on January 18. On January 13, Attorney Leyland requested Respondent to grant Schlegel paid time off for the night shift prior to him testifying on January 18, but Respondent denied the request. It would allow him to take the night shift off if he used vacation or floating holiday leave. Schlegel also spoke with HP Supervisor Dan Hines about the matter. Hines told him he could take a 6-hour floating holiday or 6 hours of vacation. Schlegel testified that he then asked Hines if he could have time off without pay or if he could get the deal that he heard the company's employee witnesses were getting, that is, being given the night off with pay the night before their testimony and then time and a half for the time they spent at the hearing. He also asked if could take off the night of January 17–18 without pay. Hines said he would get back to him with an answer. Hines got back with him a few minutes later and told him that he had to use vacation [time] or a floating holiday. Not wanting to use his vacation time, Schlegel worked a 12-hour night shift and reported to the hearing the next morning. Schlegel testified that Respondent paid him for the time he testified on January 18, about 15 minutes.

Schlegel testified that from 1993 until November 2001, he and his wife participated in a Pennsylvania child foster care program that required, inter alia, that he make a court appearance pursuant to subpoena every 6 months. On some of these occasions he did not testify. He would take his subpoenas to his supervisor who always approved him taking paid time off to attend the court. To the best of Schlegel's knowledge, this was coded as jury duty for pay purposes. If the court appearance was for a day following a night work shift, he was given that night off with pay.

4. Facts relating to employee Jerome Dailey being required, against his wishes, to use vacation time to attend the hearing pursuant to subpoena

Dailey is an RP tech at Limerick whose job is to measure radiation and contamination levels in the plant. He has worked in this job for 18-1/2 years. He works a day shift, Monday through Friday, from 7a.m. to 3:30 p.m. Dailey chose this schedule to coordinate with his wife's work schedule to best provide child care coverage. He testified that the first-line supervisors in his department are Bob Shorts, Dan Hines, John Moore, and Joe Bruno. The RP manager is Willie Harris, and the plant manager was Bryan Hanson.

He testified that to take time off an employee fills out a time off request specifying the dates the employee wants off and the type of leave sought, vacation, floating holiday or a sick leave day. A sick leave day could be used for illness or pressing personal business. The employee would call in to his supervisor and explain the circumstances and leave would be granted. In 2004 employees received seven such days and in 2005 they received five. In 2004, 7 sick leave days could be carried over, and in 2005, 5 could be carried over. Employees get vacation time based on longevity. Dailey receives 22 vacation days. Dailey has taken a sick leave day for personal business at least once since Exelon acquired the Limerick facility. This occurred in 2004. Under policies in effect in 2004, employees were expected to give 24 hours advance notice for time off. Permission to take time off could be granted if warranted, but 24 hours notice was expected normally.

Dailey received a subpoena to appear in the representation case. He asked Respondent for permission to take a sick leave day to be off on December 8, 2004.[5] He made this request in writing and it was approved. He did not mention the subpoena nor did he state in the request he was attending the hearing.

Dailey attended the meeting and sat behind the Union's attorney and Union Representative Brian Brennan. For the Respondent, Dailey recognized Limerick Plant Manager Bryan Hanson and Peach Bottom Plant Manager Joe Grimes. On this day, Dailey assisted the Union by going through Respondent's organizational charts and giving his opinion on whether the jobs shown thereon belonged in the proposed unit.

[4] A floating holiday is defined as a "paid day off that can be taken by employees with prior supervisor approval." Employees currently receive 32 hours of floating holiday leave per year.

[5] In the spring of 2004, Respondent announced to employees that beginning January 1, 2005, they would no longer be permitted to use sick leave for any reason other than one related to illness.

The next scheduled day of hearing in the representation case was December 10, 2004. On December 9, Dailey requested time off to attend this session. He made this request of RP supervisor Bob Shorts. Shorts denied the request based on his manpower needs. Dailey then told Shorts he was under subpoena and would have to show up at the hearing. He gave Shorts a copy of the subpoena. Shorts still was not convinced that Dailey had to attend the hearing, but said that he would check with human resources and get back to Dailey by lunch. When they next talked that day, Shorts told him the subpoena Dailey had shown him was only good for December 8 and that Dailey would need a new one for December 10. Dailey retrieved his subpoena and read where it states the day to appear and then requires attendance on any adjourned or rescheduled day. He again showed Shorts the subpoena and those words. Shorts again said he would check with human resources. When they next met about two hours later, Shorts told him that he could attend the hearing, but would have to take vacation because "leave time all of a sudden doesn't exist anymore." Dailey took this to mean that he could no longer take sick days as leave time. At the time, Dailey had 22 hours of sick time available to him.

Dailey told Shorts that he would take vacation time, but that he only had 3-1/2 half hours of vacation time left. Shorts told him to take that and then take the rest of the day as time off without pay. Dailey attended the hearing on December 10 and was charged by Respondent for 3-1/2 hours vacation and 4-1/2 hours time off without pay. At the hearing, the parties negotiated over a stipulation and no testimony was offered. Dailey again assisted the Union as he had on the first day of the hearing. In his job Dailey interfaces with employees from many departments and has knowledge of their duties.

Dailey testified that the Union excused him from the subpoena for the rest of December and he next was advised by the Union to attend the hearing on January 3. He requested time off about a week in advance of this date. Dailey testified that he filed a written request for 2 days off to be charged against his vacation. He testified that he asked for vacation to avoid a "hassle" and because he had been told by management that was the only option. He attended the January 3 hearing and was charged for 8 hours of vacation time.

He remembers Cindy Curtin attending this hearing day. The Respondent presented testimony and Dailey took notes and answered any questions put to him by the union representatives. He overheard a conversation between Bryan Hanson and Cindy Curtin and corroborated Curtin's testimony.

Dailey next attended the hearing on January 4, 2005. Employees attending this hearing pursuant to subpoena were Dailey, Curtin, and Roger Devlin. Devlin appeared on behalf of the Respondent and sat with management at the hearing. Devlin did not testify on January 4. At this hearing, Dailey assisted the Union as he had on previous days. Dailey was charged with 8 hours of vacation time for this day. Devlin, appearing for Respondent, was paid for the day even though he did not testify. Devlin's pay was not charged against his vacation or sick leave time. Dailey testified that the Respondent excused him from the subpoena for the hearing dates of January 5 and 6, because he was needed at the plant.

Dailey next attended the hearing on January 12. About a week prior to this date, Dailey made a written request to take off January 12, 18, and 19 as time off without pay. He had been advised by the union representatives that an agreement had been made with Respondent on the matter and it was agreed that employees subpoenaed would be allowed to attend taking time off without pay. Pursuant to this advice, he requested 3 days off as time off without pay. He gave this request to RP Supervisor Dan Hines. Hines came to him later in the day and said that human resources had directed that Dailey must take vacation time first and use it up before he would be allowed to take time off without pay. Dailey said he would do that. He had 22 days of vacation available at that time.

Dailey attended the hearing on January 12 expecting to testify that day. However, the Union offered no testimony as Respondent used the day. Dailey again assisted the Union as he had on previous days and spent the entire day at the hearing.

Dailey next attended the hearing on January 18, again expecting to testify. The Union put on witnesses but did not call Dailey. He assisted the Union as he had on previous days. Dailey was charged with 8 hours vacation for January 12 and 18.

5. Summary of lost pay by subpoenaed union witnesses and respondent's treatment of its subpoenaed employee witnesses

Dailey was charged a total of 35-1/2 hours of vacation leave for attending the hearings on December 10, 2004, January 3, 4, 12 and 18. Curtin was charged 24 hours of vacation leave for attending the hearing on January 3 and 4. Schlegel was not charged any vacation leave because he did not want to lose vacation time needed for special family needs, and consequently, he did not attend any days of the hearing which conflicted with his work schedule. He would have attended more hearing days if granted unpaid time off to attend the hearing.

Reactor operator Roger Devlin attended the hearings on January 4 and 6 and sat with Respondent's representatives. Respondent called Devlin as a witness on January 6, but he did not testify on January 4. Respondent paid Devin his wages on January 4 and 6, and he was not charged any leave to attend the hearings.

6. Respondent's leave policies

a. Respondent's leave for legal proceedings policies

According to Respondent's formal leave policy, Respondent will grant employees a paid leave of absence when they are subpoenaed to testify in a legal proceeding. Respondent's jury duty/court service policy states:

> Leave of absence is granted for jury duty. . . . A similar absence is granted for an employee's subpoenaed testimony in court if called as a witness . . . . Regular full time employees will receive pay based on a regular workday unless required to appear in court as a result of employment outside the Company. . . . A paid absence will not be granted if the employee is a plaintiff or a defendant in any case. . . . The employee's time will be recorded as "J" for the absence. Such absences are in addition to other paid time off and will not be charged

against an employee for purposes of imposing disciplinary action.

Respondent's leave policies provide that when subpoenaed employees attend legal proceeding they are not charged vacation, holiday or sick leave, and the leave of absence is recorded as "J" time. Plant Manager Grimes testified that if the legal matter settled before the witness actually testified, Respondent would still provide the subpoenaed employee a paid leave of absence.

As noted earlier, Schlegel received leave with pay when he had been subpoenaed roughly 24 times between 1993 and 2001 to attend foster care court hearings. Although Schlegel did not testify in all these hearings, no supervisor ever asked him whether he actually testified at these hearings, and he still received paid leave. Schlegel recalled on six or seven occasions being allowed to take paid leave for entire night shifts when he was scheduled to report to a hearing the following day, and he was not charged any vacation, holiday, or sick time.

b. Respondent's unpaid leave policies

According to Respondent's leave-of-absence policy, "eligible employees will be provided with approved unpaid time off under certain circumstances." The stated purpose of the leave-of-absence policy is: "To allow eligible employees whose services can be spared to take paid and unpaid time away from work for justifiable reasons." Under Respondent's written leave policy, "The Company will substitute accrued, available vacation and floating holidays for unpaid personal leave of absences. Non-represented full time employees may elect to reserve up to 10 days of vacation and 4 floating holidays for use upon their return from leave of absence."

With respect to unpaid leave, Plant Manager Grimes testified that employees are typically not allowed to take unpaid leave if the employees have not used all their accrued vacation and floating holiday leave. However, he further testified that there are exceptions to every leave policy.[6] Indeed, Respondent payroll records demonstrate that in practice Respondent granted unpaid leave of absence on numerous occasions without requiring employees to first exhaust their vacation or floating holidays. Respondent's subpoenaed chart of employees taking unpaid leave shows that Respondent granted its employees unpaid leave on roughly 857 occasions during the period of January 1, 2003, through October 25, 2005. Respondent did not provide any reasons or the circumstances explaining why it gave all these employees unpaid leave. Respondent did not provide any documentary evidence or anecdotal evidence that any of these employees were first required to exhaust their vacation or floating holiday leave. Respondent only provided a small sampling of the payroll records for the employees listed in General Council's Exhibit 40 (which lists hundred of employees taking leave without pay), and these payroll records disclose that Respondent allowed its employees to take unpaid leave on at least 23 occasions without having to first use their vacation or floating holiday leave. Payroll records demonstrate that Curtin was permitted to take 12 hours of leave without pay in July 2003, without having to exhaust her paid leave bank. Respondent likewise granted technician John Green 24 hours of unpaid leave when he had not taken any vacation, floating holiday or sick leave in that calendar year.

c. Respondent's leave for pressing personal business policies

Respondent's leave policy, entitled "Use of Absent Time," with an effective date of March 1, 2001, provides that "Absent time is available to an employee when he or she is unable to come to work due to illness or pressing personal business."[7] Grimes testified that this policy is still effective. He also specifically testified that sick leave can be used for pressing business reasons, leaving the decision on whether to grant it to the discretion of the involved supervisor. Peach Bottom Site Radiation Protection Manager Robert Norris has worked in some of Respondent's unionized facilities and at Limerick and Peach Bottom. Comparing the differences between the unionized facilities and the two nonunion facilities in question, he pointed out, inter alia, that employees at the nonunion facilities could use sick time for pressing personal business.[8] Norris gave as an example of pressing personal business tending to a broken hot water heater. There is other anecdotal evidence supporting a finding that Respondent's employees may use sick leave for pressing personal business. Dailey testified that Respondent had granted him sick leave for pressing personal business, and further, Respondent had granted him sick leave for personal business on December 8, 2004. Although Respondent did modify its written sick leave policy to become effective January 1, 2005, by decreasing the amount of sick leave available and changing the plain language of the policy, Grimes and Norris testified nonetheless that employees may use sick leave for pressing personal business reasons in 2005. In fact Norris was making this point in speeches to employees during the campaign in the spring of 2005.

d. Respondent's leave policy for representation hearings

Brennan testified, without contradiction, that Respondent had a practice since 2002 to allow employees to use unpaid leave to attend representation hearings. The Union had had other representation hearings with Respondent concerning organizing drives at other facilities. With respect to these other hearings, Brennan recalled that Respondent paid wages for employees on days they testified, but if they did not actually testify then employees would be permitted to take unpaid leave. When employees appeared for the hearing and used unpaid leave, the Union reimbursed them for lost wages. Respondent's leave policy applied to locations in Pennsylvania, Maryland, Texas, and Massachusetts. Brennan did not become aware that

[6] Employees are allowed to take "J" days, discussed earlier, without taking vacation or floating holidays.

[7] Most witnesses referred to leave for illness or pressing personal business as "sick leave or sick time," but certain policy manuals that are still valid referred to this leave as absent time. Because it is the most commonly used way of discussing this category of leave in the record, it will be referred to as sick leave.

[8] This testimony of Grimes and Norris is contrary to Plant Manager Hanson's testimony where he stated that Respondent does not grant sick leave for pressing personal business. Hanson's testimony in this regard in contrary to Respondent's written policy, the testimony of Grimes and Norton. I do not credit Hanson in this regard.

employees could no longer use unpaid leave to attend hearing until Hanson threatened Curtin with losing unpaid leave to attend the hearing.

Hanson offered some testimony on this point, testimony that was often internally contradictory as was much of his other testimony. Hanson was involved in the decision of how to treat employees subpoenaed by the Union to attend the representation hearing. He first testified that the policy was to be to require such employees to take vacation days for the days they were not going to testify and to take unpaid leave for days they did testify. Upon prompting twice by his attorney, Hanson finally testified that such employees would be paid for the days they actually testified. From what I can make of his testimony the primary reason for requiring subpoenaed employees to take vacation time was the difficulty supervisors were having covering the employees shifts because they were only being given short notice of the employees' need to attend the hearing. Hanson was asked how requiring employees to take vacation for their appearance rather that leave without pay made any difference in the supervisors' ability to fill in for their absences. Hanson had no answer.

With respect to this particular representation hearing, Hanson admitted that he met with Grimes and human resources in response to employees being subpoenaed , and decided all employees had to use vacation leave to attend the hearings and decided that supervisors no longer had discretion to grant unpaid leave or other leave to attend the hearings. At no time did Hanson testify that Respondent was merely following its written leave policies in prohibiting its employees from taking unpaid leave without first exhausting other leave to attend the hearing, and Grimes never directly testified concerning the reason Respondent prohibited the subpoenaed employees from taking unpaid leave to attend.

7. Conclusions with respect to whether Respondent violated the act by requiring union subpoenaed witnesses to use vacation leave to attend the representation hearings

There are several conclusions that are supported by the credited facts in this case. First, the Respondent's requirement that union subpoenaed employees take vacation leave or floating holiday leave to attend the representation hearing was a clear departure from past practice. In earlier representation hearings involving Exelon and the Union, employees had been allowed to take unpaid leave on days when they attended the hearing pursuant to subpoena and did not testify. Second, I find that no legitimate reason for this departure from past practice has been advanced in this record. Hanson put forth two reasons. One was that Respondent decided to require the use of vacation time and floating holidays because the Respondent was not being given enough advance warning by employees of the need to take off. This reason did not make sense when I first heard it and it makes no sense now. There is no rational nexus between the form of time off an employee takes to respond to a subpoena and the difficulty in filling that employee's position in his or her absence. Another reason advanced was that Respondent wanted employees treated consistently at both plants when they took off time to comply with their subpoena. Consistency could have been accomplished as easily by just letting the employee take time off without pay as had been the past practice. If the evidence in this record establishes anything, it certainly shows that inconsistency in applying the various leave policies is the norm rather than consistency.

The record, through the testimony Curtin, Dailey, Schlegel, and Brennan, establishes that the subpoenaed employees' knowledge of plant operations and job duties was valuable and necessary to the Union's ability to participate in a meaningful way in the representation hearing. This is true even when the employees did not actually offer testimony. The employees possessed knowledge that could not have been possessed by Brennan or the Union's attorney. Thus, the employees' presence was necessary. In addition, the subpoenas required their attendance from day to day until released.

Further, the evidence supports and I find that Respondent required the union subpoenaed employees to use vacation time because of its animus toward their union activity. Beginning first with Hanson's confrontation with Curtin at the January 3 hearing, and continuing with his threatening conversation with her in April, and continuing even after the election with Respondent's threats to Schlegel on May 6, Respondent has demonstrated hostility and animus toward union activities on the part of its employees.[9] I believe and find that animus toward the Union support and activities of the union subpoenaed employees motivated the requirement that they use vacation time instead of time without pay to comply with the subpoenas.

I find that Respondent violated Section 8(a)(1), (3), and (4) of the Act by requiring Curtin, Schlegel, and Dailey to use their vacation time to attend representation hearing pursuant to subpoenas. In *NLRB v. Scrivener*, 405 U.S. 117, 124–125 (1972), the U.S. Supreme Court stated: "[o]nce an employee has been subpoenaed he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified." By requiring these three subpoenaed employees to use their vacation time to attend the hearing, the Respondent penalized these employees for aiding and assisting the Union at the hearing.

Under circumstances similar to those in this case, the Board has found that an employer violated Section 8(a)(1), (3), and (4) of the Act by requiring a subpoenaed employee to use his vacation time instead of leave without pay to attend a Board hearing for the days the employee did not actually testify. *Western Clinical Laboratory, Inc*., 225 NLRB 725, 726 (1976). Since that Decision, the Board has made similar holdings in subsequent cases. *Fitel/Lucent Technologies, Inc*., 326 NLRB 46, 54–55 (1998); *U.S. Precision Lens, Inc*., 288 NLRB 505, 506 (1988). The Board has not limited its *Western Clinical* holding to witnesses subpoenaed by the General Counsel in unfair labor case since the *U.S. Precision* case involved a representation hearing. Id at 506.

In these three cited case, the Board found violations without any showing of discriminatory treatment. However, as noted above, there is substantial evidence of discriminatory motivation present in the instant case. The General Counsel has made a prima facie case that the involved employees union activities

[9] The April incident with Hanson and Curtin and the May 6 incident with Schlegel are discussed in the next sections of this decision.

were a motivating factor in its decision to require them to use vacation time to comply with their subpoenas. All three were known union supporters and their appearance at the representation to support and assist the Union was protected activity. As noted above Respondent displayed animus toward Curtin and Schlegel for their union support in other ways. The facts I have found earlier demonstrate many other examples of disparate treatment. Schlegel, for example was allowed to use paid time off to attend foster care hearings pursuant to subpoena before his union activities began, using so-called "J"days without having to prove to Respondent that he actually testified in such hearings. When he requested the same treatment for complying with his subpoena in the representation case, it was denied. Curtin had already been approved by management to take leave without pay to attend the January 3 hearing. As discussed above, it was only when Hanson saw her there in support of and assisting the Union, that this prior approval was withdrawn and she was force to use vacation time. Dailey had been allowed to take off December 8, 2004, as sick leave for pressing business reasons. It was only after Respondent discovered that he used the day to attend the representation hearing pursuant to subpoena that he was required to use vacation time. It should be noted that Respondents official Norris testified that employees could use paid sick leave to attend to a broken water heater, citing pressing personal business reasons as justification. The documentary evidence shows large numbers of employees being granted time off without pay without having exhausted their sick leave and floating holiday banks. As far as I can tell from the evidence the employees involved in this case are the only ones to have been required to exhaust their vacation and floating holiday banks before being granted time off without pay.[10] Moreover, Respondent paid its subpoenaed employee witness in the representation case even on days when the witness did not testify.[11] Respondent has not offered any legitimate reason why it treated the three involved employees differently than other employees and I find that its actions in this regard were motivated by antiunion animus and thus were unlawful. See *Wright Line*, 251 NLRB 2083 (1980); *Montgomery Ward & Co*., 316 NLRB 1248 (1995). It has definitely not shown that it would have required the three employees to use their vacation time in the absence of their protected activity. The witness called by Respondent to the same hearing was paid for the day he attended and did not testify. Respondent offered no evidence to prove that other employees subpoenaed to other legal proceedings were required to use vacation time to respond to their subpoenas.

8. Did Supervisor Moore threaten employee Schlegel with job loss on May 6?

Employee Robert Schlegel was a longtime active and visible union supporter. He wore union insignia and clothing items for well over a year prior to the actual organizing campaign. For the period June to December 2003, Schlegel was absent from work because of back surgery. As a result of the surgery, the State of Pennsylvania issued him a handicap parking sticker for his car which will not expire until 2008. Respondent also issued him a handicapped parking permit which allowed him to park in the handicapped section of the Limerick parking lot. In December 2003, his doctors cleared him to return to work with limitations. Before actually beginning work he reported to Respondent's Limerick site nurse, Shirley Patrilick. His restrictions were removed in April 2004 and Respondent's nurse approved him for full duty. His duties remained the same from April 2004 through May 2005.

He retained his handicap parking permit because walking up inclines is still difficult for him. The handicap parking lot does not require walking up or down an incline as is the case with the regular parking lot. He said this walking difficulty does not affect his job performance as he does not have to walk up inclines in the performance of his duties. He testified that all of his supervisors including John Moore had been aware that he parked in the handicap lot and were aware in May 2005 that he was still parking there. Nothing was said about this until immediately after the election.

Schlegel served as the Union's observer for the night voting period at the election held at Limerick on May 5. On May 6, Schlegel and his supervisor, John Moore, were meeting to go over Schlegel's quarterly performance review, which was a satisfactory one.[12] After this review had taken place, Moore told him that it had come to his attention that Schlegel had a handicap parking permit and thus was not fit to be on normal shift work.[13] According to Schlegel, Moore added that if Schlegel could not work a normal shift, he would need to find a new job. Schlegel responded that the State of Pennsylvania had determined he was eligible for the permit, that the Company's own nurse had certified him for full duty, and that State laws would not permit anyone to go through his medical files except himself, the company nurse, and anyone else to whom he gave permission. Schlegel then told Moore he considered the conversation to be harassment and retaliation for his organizing efforts. The meeting then ended. Fearing he was about to lose his job, Schlegel contacted Bryan Brennan and Attorney Leyland. Nothing came of the incident. Schlegel was neither discharged nor disciplined in another fashion.

John Moore was employed by Exelon as a radiation protection supervisor at Limerick at all times material to this decision. As of May 2005, he reported to Willie Harris. Moore directly supervised three health physics technicians, Bob Schlegel, Dennis Clark, and Kurt Red. With respect to the May 6 meeting with Schlegel where the subject of Schlegel's handicap parking pass was raised, Moore testified that Willie Harris had informed him that an equipment operator had raised a question of Schlegel's ability to perform his job if he were handicapped enough to justify a handicap parking permit. Moore testified that he and Harris had a discussion about the question and de-

[10] See *Dynabil Industries*, 330 NLRB 360, 368 (1999); *Abbey's Transportation Services*, 284 NLRB 698, 700 (1987).

[11] See *General Electric Co*., 230 NLRB 683, 685–686 (1977); *Electronic Research Co*. [I], 187 NLRB 733 (1971).

[12] Schlegel's performance evaluation for 2005 though August supports Schlegel's assertion that he is capable of doing his job adequately.

[13] Schlegel was unaware that any employees may have complained about him having a handicap parking permit. Schlegel had complained to management by other employees using the handicap spaces without having a permit.

cided it should be investigated as all concerns raised by employees get investigated at Exelon.[14] Moore testified that he and Harris did not have a problem with Schlegel having a handicap parking permit, they just wanted to make sure Schlegel was able to perform the job duties of his position. When pressed on this point, Moore testified that he was concerned whether Schlegel could use Scuba gear, with was conceivably something he might be called upon to use. He was also concerned whether in his role as a member of the fire brigade, Schlegel could put on the fire fighting equipment, and in his role as a first responder to an emergency, whether Schlegel could drag a person away from danger. Moore testified that he had not had an occasion to observe Schlegel do any of these out of the ordinary tasks recently.

Moore testified that in the meeting with Schlegel, he went over Schlegel's quarterly performance review for 10 to 15 minutes and then told Schlegel that an equipment operator had raised the question of Schlegel's ability to perform his job considering the fact that he had a handicap parking permit. According to Moore, Schlegel replied that the question of his handicap status was between him and the state of Pennsylvania and he was not going to discuss the issue with Moore. Moore testified that he responded that his only concern was whether Schlegel was able to perform all the duties his job called for. According to Moore, Schlegel responded, "Yes, I can." Moore said the conversation ended. Moore testified that he reported to Harris that Schlegel could perform his job. Subsequent to Schlegel's return to work without physical restrictions, Moore had observed him don Scuba gear, and although not directly observed by Moore, he knew that Schlegel had engaged in fire drills where he was required to wear full firefighting gear.

Moore denied telling Schlegel that he could not perform the functions of his job, or telling him that he would need to look for another job. He denied telling Schlegel that if he could not perform his job, he would have to look for other work.

Willie Harris testified that the matter of Schlegel having a handicap parking pass was brought to his attention about days prior to the election. He said the information came to him in a voice mail from the operations manager, who was passing along information from an equipment operator who had observed Schlegel parking in the handicap lot. Harris testified that he was familiar with Schlegel's back surgery and return to work, but was not aware he had a handicap permit. Harris testified that he had a concern that something had happened since Schlegel's return to cause him to have a handicap permit. Thus, he asked Moore to inquire of Schlegel if he were fit to perform his job.

I credit Schlegel's testimony with respect to this incident. It appears to me that Respondent was just looking for a way to harass Schlegel. He had been back on full duty for a year, had gone through several fire drills that tested his ability to use the equipment which might be difficult to use if his back were still injured. Moore had personally seen him don scuba gear, which was the other concern Moore expressed. Moore himself had given Schlegel several satisfactory performance evaluations. Moore had also known for some time that Schlegel had a handicap parking permit. Even if I accept that a complaint was actually made about Schlegel by another employee, and the timing of the alleged complaint raises doubt about that, Respondent's response was irrational. Given Moore's knowledge of Schlegel's capabilities, a normal response to Harris' inquiry would have been to say that, "[y]es, he has a handicap parking permit, but has been doing his job satisfactorily for over a year since returning to full duty." That Moore would go through the charade of asking Schlegel a question about the matter when Moore already fully knew the answer indicates to me that he and Harris simply wanted to harass Schlegel. I would also note that Harris did not inquire of Moore whether he knew of the parking permit and whether Moore thought Schlegel was fit to do the tasks he might be called upon to perform.

A further indicia of Respondent's motivation can be found in an incident occurring later on May 6. Schlegel had worn his union button and hat to work on that day. According to Schlegel's uncontested testimony, during the afternoon after the outcome of the election was known, RP Supervisor Bob Shorts told him he had until the end of the day to take off the union insignia or he would face discipline. Shorts added that the election was over and the Union had lost.

Based on Schlegel's credited testimony, I find that Respondent threatened Schlegel with loss of his job because of Schlegel's activity on behalf of and sympathy for the Union. By doing so, Respondent interfered with, restrained, and coerced Schlegel in the exercise of his Section 7 rights in violation of Section 8(a)(1) of the Act. See *Equipment Trucking Co*., 336 NLRB 277 (2001); *Merit Contracting, Inc*., 333 NLRB 562 (2001); *Overnight Transportation Co*., 332 NLRB 1331 (2000).

D. Facts and Conclusions with Respect to the Objections

The Objections in Case 4–CA–20940 allege that Respondent, during the critical preelection period:

> 1. Threatened employees with changes in their work hours, shifts and loss of flexible work hours if the employees voted for union representation.[15]
>
> 2. Threatened employees that the selection of the Union would be futile and implied that Respondent would not bargain in good faith.[16]
>
> 3. Engaged in captive audience communications within 24 hours of the election, and during the election, engaged in unlawful surveillance and electioneering.[17]
>
> 4. Threatened employees with layoffs if the Union won the election.[18]

In the Regional Director's notice of hearing, these four objections were listed together with certain factual allegations related to each. In some cases the Union provided evidence related to the factual allegations, in others it provided no evidence. Additionally, the Union offered evidence of occurrences clearly directly related to the objections, but for which there is

[14] Moore was aware at the time of this discussion and for 2 or 3 years prior to it that Schlegel had a handicap parking permit.

[15] Objection 1.
[16] Objections 2 and 3.
[17] Objections 5 and 6.
[18] Objection 9.

no factual allegation set out in the Regional Director's notice of hearing. I have considered and made findings with respect to each such allegation as they were fully litigated at hearing. All objections and factual allegations relating to them that I do not explicitly sustain are overruled.

1. Objection 1 alleges that Exelon unlawfully affected the outcome of the election and interfered with, restrained, or coerced employees by threatening employees with changes in their work shifts and loss of flexible work hours

a. Threats to change overtime and loss of flextime

i. Orphanos' alleged threat

At a meeting in April between about 12 Limerick employees including Cynthia Curtin and a management consultant named Manny Gonzales, Limerick's shift ops superintendent, Peter Orphanos, told the employees that if the Union was elected, everyone would have to work the same amount of overtime. He also told them that management flexibility would be lost and supervisors would no longer be able to let an employee leave work early or come in late. At the time of the meeting overtime was voluntary with employees with the lowest amount of overtime being the first offered it and if they did not want to work it, the next lowest employee would be offered the overtime. Curtin testified that she did not work overtime except in outage situations or when there was no one else available. She testified that she worked the least amount of overtime among the employees in her job category. Curtin's testimony about this meeting is not contradicted.

I find Orphano's threats to be objectionable conduct. There was no hedging whatsoever in his statements to these employees. The adverse changes in overtime and flexibility he announced would occur if the Union were elected were not phrased as potential results of unionization, but were phrased as a certainty. Even if his announcement were only a prediction, such a prediction was not accompanied by an articulation of objective evidence supporting the prediction as is required.

ii. Hanson's alleged threat

Employee Jerome Dailey had a conversation with then-Limerick Plant Manager Bryan Hanson in mid-April, 2005. Hanson asked why Dailey had used flextime the day before. Dailey responded that his wife had worked a night shift the preceding evening and he had had to take his child to school, forcing him to come in late. According to Dailey, Hanson seemed agitated and said that he hoped Dailey did not lose the ability to use flextime. This conversation ended. Later that same day, Dailey approached Hanson and expressed his disappointment with Hanson bringing up what Dailey believed to be personal business related to his daughter. According to Dailey, Hanson said it was personal to him because he believed that he could represent the employees better than [a union] can.

Dailey then told Hanson that Respondent's union employees at other facilities had flextime and showed him an actual work schedule containing flextime in an Exelon contract. Hanson replied that he hoped that the employees did not lose the rotating shift schedule because then Dailey might not be able to take his daughter to school. He added that he hoped Dailey got the second shift so he could continue to do this.

With respect to the one-on-one conversation with Jerome Dailey, Hanson testified that he related an anecdote of an Exelon employee at one of its unionized facilities. The employee wanted to get an undergraduate degree and needed flextime to accommodate his college schedule. Exelon granted it, but Local 15 filed a grievance and the Company was required to return him to his old schedule. This forced the employee to use vacation time to make the classes. This was related after Dailey noted that he had had to use flextime to get his daughter to school. Hanson then testified that a few days later, Dailey came to him with a side-bar agreement between Exelon and Local 15, wherein supervisors are encouraged under certain family circumstances to afford some flexibility to employees to meet family and schooling needs. He then told Dailey the side agreement did exist but was no longer used as supervisors faced grievances when they did use it. Hanson denied saying anything to Dailey about hoping he got second shift if the union came in. Hanson added that he took the campaign personally because he felt he was doing a good job representing the employees.

Dailey testified that 2 days later Hanson met with 15 or 16 eligible voters in mid-April 2005 at the Limerick facility. Other than Hanson, about seven or eight management employees were also in attendance. The meeting lasted about 45 minutes.[19] According to Dailey, Hanson told the employees that they would lose a lot of things they presently had, like flextime and rotating schedules. Dailey testified that Hanson referenced the work schedule Dailey had given him 2 days earlier. Hanson told the employees that flextime was in the schedule but the plant practice was not to use it. Under cross-examination, Dailey agreed that Hanson made his comments in the context of an issue like flextime could be negotiated, could be lost, or even if saved during negotiations, might still not be applied.

At this meeting, in response to hearing from employees that flextime had been eroded over time, Hanson related that a study of company records showed that many employees were working schedules of their own making. He concluded flextime was still viable at Limerick and Peach Bottom.

I credit Dailey's version of these conversations over that offered by Hanson. As noted in the earlier part of this decision relating to unfair labor practices, I found Hanson to be an evasive and unbelievable witness hostile to the Union and the individuals involved in this proceeding. He appeared to take their support for the Union personally and responded. I find that Hanson's statements to Dailey about the potential loss of flextime and a shift change for Dailey were implied threats of adverse changes in working conditions. Respondent did not introduce any witness to support Hanson anecdote, the contract with the local involved in the anecdote or a witness to explain it. I believe and find that Hanson's statements to Dailey individually and in the employee meeting in question were intended to coerce and frighten the employees and were taken in this manner by Dailey and the employees attending the meeting.

[19] Prior to this meeting, Dailey had attended other company meetings where the subject of contract negotiations had been discussed.

iii. Did Plant Manager Hanson threaten employee Cynthia Curtin with more overtime if the Union won the election?

Curtin works a swing shift, working days and nights on an alternating schedule. The shifts are 12 hours in duration. She testified that she might work 2 12-hour days, then have 3 days off, then work three night shifts in a row. Her department has five shifts of people whose schedules alternate weekly over a 5-week period. Curtin has been working a shift of this nature for 20 years. Before that, she worked 8-hour shifts.

After the incident at the hearing on January 3, Hanson and Curtin did not speak to one another until April 20. Curtin was working and was relieved and told to go to a meeting with Hanson. She took another operator with her as a witness, but Hanson told him to leave, that the meeting was not a disciplinary meeting. Curtin then told Hanson that if he wanted to talk about things she did not want to talk about, she would leave. According to Curtin, Hanson then told her that she thinks he (Hanson) is the anti-Christ. She denied this assertion saying that she did not use that language. He then told her he was disappointed in her and the outcome of the representation hearing. Curtin said she was not disappointed. Hanson then stated that the two had been avoiding each other but that he could not avoid her in her work area. He then said, "Cindy, I am really worried about your family." She at first did not respond and he repeated the statement. She asked why and he said that she was not going to be able to spend a lot of time with her children if the Union came in because she would be working a lot of overtime. She disagreed and said that she thought overtime would be shared equally and that employees would not be forced to work overtime. He indicated his disagreement with her and the meeting ended.

Hanson testified about this meeting. He testified that on the day in question he was in her work area on a routine tour. He testified that following the incident on December 8, 2004, Curtin was not comfortable talking to him and he was not comfortable talking with her. He felt it important to overcome this barrier as it was important for them to freely communicate for her to adequately and safely perform her job. For this reason he asked her to get relief and come to the shift manager's office. She came with another employee who Hanson sent away noting that he merely wanted to have a conversation with Curtin and it was not a meeting that could result in discipline. According to Hanson, he and Curtin talked about the fact it was important they feel comfortable with one another so she feels free to bring to his attention any job related issue that might impact on her job performance. According to Hanson, she indicated she felt they could do that. He then told her of some of his experiences supervising unionized employees at the Dresden facility. He pointed out that Curtin is in the unusual situation where both she and her husband work at Limerick. She works a rotating shift. He husband is an engineer who is called upon to troubleshoot problems at the plant. There have been occasions when she is working and he is off, and is called in. On those occasions, she has been sent home to cover for her children. Curtin is also an employee who does not work substantial overtime, usually working overtime only in outage situations. He pointed out that under the Local 15 contract overtime can be mandatory and the supervisors spend little time finding a volunteer to work overtime regardless of the family situation. He noted she enjoyed a lot of benefits at Limerick which does not have forced overtime. She acknowledged that she does not like working overtime and had not looked into what that aspect of the job might be under a union. He testified that he pointed these things out to her as the Limerick employees and many supervisors had never worked in a union environment and might not know how things differed. Hanson was asked whether he ever directly told Curtin that she would work more overtime if the Union came in. Instead of a denying that he had so informed Curtin, he launch into an explanation of what he could and could not do in the circumstances of the campaign. He testified that he told her that she should look into the differences in how things were done at Limerick and Peach Bottom compared with Exelon's unionized facilities.

As with most of Hanson's testimony, I do not believe he is telling the truth. His answers about this incident were vague and evasive. On the other hand, Curtin's testimony was clear and logical. Her testimony is also consistent with Hanson's demonstrated hostility toward Curtin because of her support for the Union. This incident was not alleged as a violation in the complaint nor was it part of the amendment to the complaint allowed on the first day of hearing. The Union on brief asserts that this evidence should be used to find a violation of Section 8(a)(1) of the Act and independently as conduct objectionable to the election. I believe and find that if the General Counsel had wanted a violation found, she should have included the allegations in her amendment to the complaint. Having not done so, I will not find an unfair labor practice. Having said that, had it been part of the complaint, I would have found it violated Section 8(a)(1) of the Act because it predicted adverse employment conditions if the Union won the election and was not based on objective factors. The conversation was clearly coercive given Curtin's family situation and predicted worse and less flexible working conditions in the event the Union was elected. I do find the incident as evidence of Respondent's animus toward the Union and its supporters. I also find that it was conduct objectionable to the election and supports finding sustaining Objection 1.

b. Alleged threats to change work schedules and shifts

i. Alleged threat by Willie Harris

Robert Schlegel is a RADPRO tech. There are 22 such positions at Limerick. Ten of these techs work a rotating shift on a 5-week cycle. Schlegel described this schedule. It starts with 4 days of day work from 5:30 a.m. to 5:30 p.m.; then 8 days off, then 4 nights of night work from 5:30 p.m. to 5:30 a.m.; then 3 days off, then 3 days of day work; then 1 day off, then 3 nights of night work; then 3 days off and then a week of utility work, Monday through Friday from 7 a.m. to 3:30 p.m. The other 12-work a shift Monday through Friday, 7 a.m. to 3:30 p.m. The choice as to which of the two types of shifts an employee wants to work has been left to the employees. Schlegel chose the rotating shift because it best suits his special needs because of the care he must give to one of his daughters who is disabled.

Schlegel testified that the RP Manager, Willie Harris, met with about 10 radiation protection employees and 20 profes-

sional employees in the RP breakroom on December 2, 2004. The 10 RP employees were eligible to vote and the professional employees were not eligible. Harris regularly meets these employees for a variety of work-related reasons. At the December 2 meeting, Harris told the employees that if the union got in, Respondent might go to a 24-hour maintenance schedule, with three 8-hour shifts. There would be a day shift from 7 a.m. to 3:30 p.m., an afternoon shift from 3 p.m. to 11 p.m., and a night shift from 11 p.m. to 7 a.m. If this happened, 40 percent of the techs would be on the day shift, 30 percent on an afternoon shift, and 30 percent on the night shift.

Supervisor Harris denied making shift work a topic he raised in the December 2004 employee meeting. He did respond when employees raised the topic. He denied telling employees that if the union were selected, Exelon would implement 8-hour shifts and eliminate the 12-hour rotating shifts currently used by about half of the employees working under him.

He testified that he told employees that if the Union won, "there are certain outcomes that are going to occur." "And those are going to be, you know, negotiated." He then added that that are certain parts of the company currently under union contracts, and they have work schedules that are different than those at Limerick, and that could be a potential outcome. He testified that on this subject he said:

> On the topic, I said, you know, around the contract is that, you know, when you get into the union or the union was to win, you know, there's certain outcomes that are going to occur, you know. And those are all going to be, you know, negotiated. It's a give and take process. And the only thing I did say is that, you know, we have other factions or parts of the corporation that are, you know, currently under contract and they have shift work schedules that are different than ours, and that could be a potential outcome.

Schlegel testified that information for employees is often left in the breakroom on a windowsill near the entrance to the room. Shortly before the election in May 2005, Schlegel found ten copies of a handwritten document on the windowsill. He testified that he is familiar with Harris' handwriting and the document was written by Harris. It appears to place the RADPRO techs in three work shifts by name. Schlegel appears on the night shift. The document would comport with what Harris had told the employees on December 2, 2004. In addition to doing away with the rotating shift and placing the 10 techs who work that shift on one of the three new shifts, the document shifts some of the techs then working the regular day shift to other shifts.

Harris admitted preparing the handwritten proposed new shifts. He created the document in April. He testified that it was prepared as a contingency plan, presumably to be used if the Union were voted in. According to Harris it was for distribution only to his supervisors to generate feedback from them if the department had to implement a shift work schedule similar to the one he proposed. The document was given to the supervisors in a conference room next to his office during a meeting of supervisors. Prior to this hearing, Harris was unaware that the document may have been found by employees in the break room. The document, which he testified was prepared as a contingency plan if the Union were to win the election. He also agreed that if the Union won, a new contract would probably take about 8 months to negotiate.

I credit Schlegel's testimony over that of Harris as I found Harris to be evasive and his testimony in some respects incredible. His rambling denial of threatening a schedule change appeared to me to be false. Moreover, what better way to back up his threat of schedule and shift changes if the union were elected than to put out a shift and schedule change plan much closer to the election. This is especially true when the plan he did prepare makes drastic personal changes in the schedule of the individuals in the department. His explanation that the plan was a contingency plan does not ring true. Even if the Union were to have won the election, there would be no need for such a plan until negotiations and perhaps not even then depending on the parties' positions. On the other hand, the plan he prepared which readily got in to the hands of the employees affected by it would have a chilling and coercive affect on their decision as to how to vote in the election.

ii. Alleged threat by Hanson

Dailey testified that in the mid-April meeting noted above, Hanson told the employees that the rotating schedule would change to a permanent straight shift schedule. Hanson added that 40 percent of the employees would work an 8-hour shift, and 30 percent each would work on second and third shifts. The shifts would cover all 7 days in a week. Dailey was not working weekends at the time.[20] Dailey testified that at other meetings he had been told by management that the matter of changing to straight shifts was not negotiable, even though Dailey himself believed it to be negotiable.

Hanson testified that at some point in April, he and Site Vice President Ron DiGregorio met with the radiation protection employees to go over issues and answer questions. Hanson recalled questions about the Local 15 contract and other Exelon contracts. They were asked whether Exelon would go to shift work and Hanson testified that they answered that they could not predict what would happen in the future. He then shared with the employees that at the Company's unionized plants 40 percent of employees work a day shift and 30 per cent each of the remaining employees work an evening shift and night shift. He testified that again he could not predict what might happen. He testified that at Peach Bottom and Limerick, Exelon pays a premium of about a million dollars a year at each site in overtime costs that would be saved by a change to straight shift work schedules.

I credit Dailey's version of this meeting over that offered by Hanson. As was his standard behavior on the stand, he admits much of the factual material offered by employee witnesses while denying that he made threats or admitting what he said but saying it was only a possible outcome. I did not believe him when I heard him testify and I do not believe him now. Dailey's version of what Hanson said is supported by Harris's actions

[20] During the campaign, Dailey had read contracts between the IBEW and Exelon at its unionized plants and was familiar with hours of work and scheduling under those contracts. Some of them called for straight 8-hour shifts, 24 hours a day, 7 days a week as described by Hanson in the meeting.

and by the similar statements made by management at the Peach Bottom facility.

iii. Alleged threat by Joe Grimes and Bob Braun

Charlotte Vest is employed by Respondent at its Peach Bottom facility as a utility technician. She was eligible to vote in the election. Vest, as do all utility technicians at Peach Bottom, works Monday through Friday, 7 a.m. to 3:30 p.m. She served on the employee organizing committee with about 15 other employees. The committee held about 15 meetings. In these meeting she was told about the contracts Exelon had with its unionized facilities.

Vest attended a meeting about a week before the election chaired by Plant Manager Grimes and his superior, Peach Bottom Vice President Bob Braun. There were about 30 employees in attendance, the large majority of whom were eligible to vote. The employees were told that Exelon has two different staffing matrixes, one for union plants and another for nonunion plants. They added that if Limerick and Peach Bottom become unionized, there was no reason why they would not go to the union staffing matrix. Under this matrix, there would be three daily 8-hour shifts covering 24 hours. Employees would not be assigned permanently to a specific shift, but would rotate through all three. For Vest this would constitute a change as she is currently assigned to just one shift. It was Vest's perception from what she was told in this meeting that the subject of staffing matrix would not be negotiable.

Grimes testified about the 10 or 12 meetings conducted by him and Bob Braun with employees in the week preceding the election. Grimes called these meetings "town hall meetings." Grimes testified that at the meetings, the two company officials gave employees the opportunity to obtain information about the Fossil contract and other contracts the company had with the IBEW at other locations. They were given time with the Company's negotiator to learn what is involved in negotiations and about all the things that are negotiable. Employees were also encouraged to ask questions. Grimes denied telling employees that the Company would not negotiate with the Union. With the issue of shift work, it is of interest to some of Respondent's employees and not to others. For some shift work is what they have now and for others it would constitute a change. He testified that employees asked why in other Exelon locations, shift work was utilized and not at Peach Bottom. He encouraged the employees to call other locations where shift work was the norm and ask about it. He denied threatening employees with shift work if the Union were to be voted in; instead, he testified he told employees that would be negotiated.

I credit Vest's testimony over that of Grimes. At Limerick the clear message to employees was that if the Union were elected, work schedules and shifts would change. I find that through Grimes and Braun, the same message was conveyed to employees at Peach Bottom. Grimes clearly tied the continuation of flexible scheduling to staying nonunion. He testified that in response to why the unionized Exelon facilities had shift work and Peach Bottom does not, he answered: "We talked about that that was, you know, it was basically that our (Peach Bottom) employees have provided us the opportunity to utilize them to work the shifts we needed, when we needed them. And so long as we had the ability to do that, we would absolutely try to do that." The only difference between Peach Bottom and Exelon's other facilities is that the other ones are unionized, and thus the "opportunity" that Exelon has at Peach Bottom is the absence of a union.

c. Conclusions with respect to Objection 1

Based on the credited evidence, I find that Exelon made it clear to the affected employees that one result of selecting the Union would be a change from rotating schedules to fixed shift schedules, an adverse change for many of these employees. I further find that the impression was left with employees that this change was going to occur and was not negotiable. There was no rational nor objective facts offered to explain why the schedule change would occur except that that was the way things were done in its unionized facilities. The employees were not shown contracts at other facilities to demonstrate that shift work was the norm. If the Peach Bottom employees selected the Union, clearly the subject of shifts and schedules would be negotiable and there is no reason why a new contract would have to mirror what was done at other unionized facilities. By predicting that a shift and schedule change would be a given in the event the Union were selected I find that Exelon made unlawful and objectionable threats.

Similarly, Exelon has threatened employees with the loss of flextime and with the ability to accept or reject overtime. These threats were not based on objective facts to convey an employer' belief as to demonstratively probable consequences beyond his control. I find the threats made to be unlawful and I sustain Objection l.

The standard for determining whether an employer's prediction is an impermissible threat was set forth by the Supreme Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969). The Board must focus on, "what did the speaker intend and the listener understand." Id. at 619. Any evaluation of the speaker's comments, therefore, "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed to the disinterested ear." Id. at 617.
In developing what is now a well-settled principle, The Court in *Gissel* held:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the "communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of re-

> taliation based on misrepresentation and coercion, and as such is without the protection of the First Amendment."

Id. at 618.

Accordingly, to be lawful, an employer's prediction must be based on objective, demonstrably probable consequence that are beyond the employer's control. That was not the case here.

2. Objections 2 and 3 allege that Exelon unlawfully affected the outcome of the election and interfered with, restrained, and coerced employees by implying that the selection of the Union would be futile and that the Company would not bargain in good faith

a. Exelon would insist on an agreement like the Fossil agreement

Cynthia Curtin testified that in late April, she and about a dozen other eligible voters attended a mandatory meeting called by the Employer at the Limerick facility. At this meeting, a consultant hired by Respondent spoke about the Fossil contract between Exelon and Local 614. She remembered the consultant's name as Manny Gonzales. Gonzales told the employees that he and the other consultants hired by Respondent were an independent group that was going to tell the employees the truth and the facts about how unions and contracts work. According to Curtin, Gonzales said that when you negotiate a contract that everything starts at zero and it is a give and take thing. Curtin testified that though the message he gave was that things could improve, stay the same or get worse, the emphasis was on losing rather than gaining. She also testified that he told the employees that you start with nothing and to get a contract you have to bargain everything back; it is not like to starting where you are, you start with nothing. Then he showed the employees the recently negotiated Fossil contract and told them that the Fossil contract was as good as it gets, and that the Limerick employees would not get a better contract than the Fossil contract. An employee asked Gonzales if they could see a contract at one of Exelon's unionized nuclear plants. Gonzales told them there was no reason to show them one because Local 614 would be their union so the contract would be the same one as the Fossil contract. Some copies of the Fossil contract were passed among the employees at the meeting. Gonzales did not testify.

Jerome Dailey attended a meeting conducted by Manny Gonzales and remembers Gonzales telling the employees that the Fossil contract was the one they would get, adding that if the employees wanted Local 15's contract,[21] they should have joined Local 15. Dailey attended a later meeting conducted by Gonzales' fellow consultant Oliver Bell and was told the same thing. Neither Gonzales nor Bell testified.

I credit the uncontradicted testimony of Curtin and Dailey about the meeting with consultants Gonzales and Bell and thus find that they told eligible voters that they would either get the Fossil contract or one that was not better.

Exelon Utility Technician Charlotte Vest testified that an Exelon representative named Mark Gridley held a few meetings with employees at Peach Bottom. Gridley told them that he was Exelon's negotiator in the negotiations with Local 614 for the first contract at the Fossil generating plants. In one mandatory meeting about a month before the election with about 50 eligible employees in attendance, the contract that had been reached was discussed. Gridley said that bargaining is give and take, but that in his opinion, the employees at Peach Bottom would not get anything better than the recently negotiated Fossil contract. Frank Carter is president of Local 614. Gridley said that Carter would not be interested in getting the nuclear group a better contract than the one he got for the Fossil plants because the Fossil employees would then be mad at him.

Based on Vest's meetings with her fellow organizers and union representatives, she believed that bargaining involves give and take and there is no guarantee that employees will get what they start with, but there is no guarantee that they will not get more. This is what she told fellow employees during the preelection period if they asked her.

Peach Bottom Maintenance Technician James Hoch attended a mandatory meeting in April 2005 where Mark Gridley addressed employees on the subject of the Fossil contract. Hoch testified that there were 80 to 100 eligible voters at the meeting. Gridley held up what Hoch presumed was the Fossil contract and told the audience that they would probably not get a contract any better than the one Local 614 had just negotiated.
Mark Gridley is the labor relations liaison for Exelon. He has held this position since June of 2004. His job includes handling all labor relations between Exelon and Local 614. He participated in the negotiations leading to the Fossil contract. His participation began in June 2004 and the negotiations had begun in March 2004.

During the union campaign at Limerick and Peach Bottom, Gridley spoke to employees twice at both facilities. At the first Limerick meeting about 75 to 100 employees attended. On his second trip to Limerick he held two meetings with different employee groups, each with about 30 to 40 employees attending. The first Peach Bottom meeting had about 60 to 70 employees in attendance. On his second visit there he held meetings within departments. The same topics were discussed at each meeting. He discussed the negotiating process and the Fossil contract.

With respect to the negotiating process, he told the employees that each side comes into bargaining with initial proposals that are far apart and you whittle down to an area where something could be ratified. He did not recall saying the employees start bargaining at zero. He testified that he said you have a clean table to start from. When he talked to the employees about the Fossil contract, he had in hand a five page summary of the contract. He did not pass this out to employees. He did not discuss benefits because the benefits in the Fossil contract were the same as those in place at Limerick and Peach Bottom. He did talk about a general wage increase, an annual incentive plan, management rights, schedules and overtime. He received employee questions about overtime and sick time. He denied telling the employees that the Fossil contract was the one they would get if they selected the Union. He testified that in response to a question, he answered that the Limerick and Peach Bottom employees would have a different contract because

[21] IBEW Local 15 represents Exelon employees at facilities in Illinois.

they were nuclear plants. On the other hand, he testified that he might have told the employees in these meetings that the Fossil contract would be a template for their contract or words to that effect. He also admitted asking rhetorically did the employees at Limerick and Peach Bottom think that Local 614 would negotiate a contract for them that would enrich them more than the Fossil plant employees.

He was asked if the employees would get a contract like Local 15 had with Exelon at its Illinois nuclear facilities. Gridley testified that he laughed and answered that the Local 15 contract had been built over 30 or 40 years, and that the Limerick and Peach Bottom contract would be a first time contract. Gridley testified that there were many questions about flexible work assignments and schedules, call outs and contractor language. Gridley denied telling the employees that Exelon would not negotiate with Local 614.

With respect to the Gridley meetings with employees, I can find no substantive difference between his testimony and the employees' testimony.

Daniel Kern works as a RP Tech at Peach Bottom. The RP Manager at Peach Bottom is Bob Norris and he conducted regular meetings with RP employees on work related topics. Late in the campaign period before the election, Norris discussed the Fossil contract with employees in one of these meetings. Ten to twelve of the employees present were eligible to vote. In this meeting, contrary to his usual practice of sitting with the employees, Norris stood and told them that he had the Fossil contract fresh off the press. He told them that the Fossil contract would be a template for the Peach Bottom employees if they voted for the Union.

In the spring of 2005, depending on the Respondent's staffing needs, an employee could ask the day before and be given permission to use a floating holiday without any questions. Norris told the employees that if the Union were selected, management can and will make employees give five days notice before using a floating holiday. At the time of the meeting, employees were not required to produce a note from a doctor if they were out sick for two days. Norris told the employees that Respondent can and will require a doctor's excuse for two or more days absence due to illness if the Union is selected. At the time of the meeting, RP Techs routinely performed overtime and this work was not typically performed by RP Supervisors. Holding the new contract, Norris then said that if the Union were selected, Respondent can and will have supervisors perform tech overtime work if it saves money.

Though Norris never said it, Kern assumed the contract that Norris was holding gave management the right to do the things Norris said. It was Kern's impression that Norris was telling the employees that these things would happen if the Union came in. Kern was aware that everything in a potential contract had to be negotiated, but was led to believe by Norris and did believe that the things mentioned in the meeting by Norris would be the same in any contract at Peach Bottom. Kern said no one asked question in response to Norris's request for questions. Kern testified that Norris speaks in a very threatening manner and he felt threatened and intimidated.

Robert Norris is the site radiation protection manager at Peach Bottom, the position that Willie Harris fills at Limerick. Prior to coming to Limerick he had worked in management at what became Exelon's Dresden nuclear facility where employees are represented by Local 15. He is very familiar with working in a unionized setting. At Peach Bottom during the campaign by Local 614, he was part of a management team that met with employees to provide as much information as possible. When he spoke with employees during that time about the negotiations at the Fossil facilities, his message was let's wait and see what happens in those negotiations, because common sense would lead one to believe that contract would be a template for negotiations at Limerick and Peach bottom if the Union were voted in.

Norris also told employees about his experiences working with the Local 15 contract. He testified that the relationship between Local 15 and management is confrontational. He told them of the loss of flexibility and that the difference in relationship between management and employees at Peach Bottom is like night and day compared with his experience at Dresden. He gave employees examples of the inflexibility at Dresden. He pointed out that at Dresden, employees out sick two or three days must bring in a doctor's excuse to be paid, that employees could not take sick days for personal pressing business; a situation not existing at Peach Bottom. He pointed out an agreement reached with Local 15 to send employees to other facilities to work during an outage and at the last moment Local 15 reneged and the involved employees could not support the outage. He told Peach Bottom employees that union employees at Dresden were upset with union leadership and felt they had no voice in the union. He referred the Peach Bottom employees to a Dresden union steward to verify what he had been telling them.

Norris testified that he was present for a meeting where Mark Gridley informed Peach Bottom employees about the Fossil contract. The meeting was voluntary and none of Norris's employees who were eligible voters attended. He was disappointed that none attended, so he had the Fossil contract copied and distributed to his employees. He then had a meeting with his employees to discuss the contract. He told them that it was reasonable to assume a contract negotiated on their behalf would look like the Fossil contract. He indicated it would be a template for Peach Bottom negotiations and not the Local 15 contract. He denied telling employees they would never get anything better that the Fossil contract and denied saying they would get something worse. Norris and his supervisors prepared a one page document noting 21 areas where they felt the Fossil contract provided less flexibility than presently existed in the nonunion Peach Bottom operation. This was provided to his employees at the meeting. Among areas highlighted were sick leave and shift work. Norris noted that the way shifts are operated in his department cause more overtime than would be incurred if Peach Bottom went to only 8-hour shifts. At some point he told his employees that the Local 15 pension plan was not on the table.

He testified that he never spoke with employees about his supervisors performing bargaining unit work to avoid paying overtime to unit employees. Under the nonunion situation at Peach Bottom, supervisors perform unit work only in emergency circumstance. Under the Fossil contract management is

given the right to perform unit work so long as it does not result in the layoff of a unit employee.

I find no substantive credibility gaps between Norris's testimony and that of the employee witnesses.

b. Employees would "start with nothing" and "bargain from zero" at the bargaining table

As noted above, Curtin testified without contradiction about a meeting conducted by Exelon's consultant Manny Gonzales. During this meeting, Gonzales told the employees that bargaining would "start from zero and that everything's up for negotiations. Yeah, it's possible that things can get better but . . . It's more probable that they would get worse." Gonzales explained that simply because the Union comes in the Company could take "stuff" away and the Union's got to negotiate it back. "You have nothing to start with and you have to bargain to get it all back."

c. Other statements of futility

Norris admitted that he told employees that the Local 15 pension was not on the table. Similarly, employee James Hoch testified without contradiction that Gridley told 80 to 100 eligible employees at a mandatory meeting in April 2005 that they would never get the same retirement benefits that Local 15 got. Employee Vest testified about a mandatory "town hall meeting" attended by at least 30 other eligible voters conducted by Grimes and Braun. Vest testified that one of the two executives stated during the meeting that Exelon has two different staffing matrixes—one for union plants and one for nonunion plants—and that if the employees elected the Union, there was no reason why the plant would not go on the other staffing matrix. Vest testified that Grimes suggested that the Company would not budge on this issue and that the change would be a given.

d. Conclusions with respect to Objections 2 and 3

With respect to the Objections so long as they relate to informing employees that they will only get a contract like or worse than the Fossil contract, I find that Respondent's consultants Gonzales and Bell crossed the line into objectionable conduct. The clear implication of their statements to employees was that it would be futile to select the Union as they would only get what was in the Fossil contract or worse. Gonzales reinforced this message of futility by stating that bargaining would start at zero that it is probable that terms and conditions of employment would be worse after bargaining, and that if the employees voted in the Union, the company could take benefits away and the Union would have to negotiate to get them back.[22] These statements were also being made at a time when employees were being told that there would be staffing and shift changes, and that those changes would occur. Norris even told the employees that they would get less favorable treatment in regards to flexibility and sick time. Taken together, the statement could easily be construed by a voter as reasons why it would be futile to support the Union. Gonzales and Bell certainly refuted any statements by management to employees that collective bargaining was a give and take proposition and that anything was possible. As far as I can tell from this record, Respondent did not effectively repudiate the statements of the consultants and I find that their objectionable conduct could well have affected the outcome of the extremely close election.

3. Objection 5 alleges that Exelon unlawfully affected the outcome of the election and interfered with, restrained, and coerced employees by engaging in captive audience communications within 24 hours of the election

On the day of the election, Peach Bottom employee James Hoch was in the Respondent's cafeteria about 11 a.m. There were 30 to 40 other people in the cafeteria at the same time. He testified that there are two television monitors in the cafeteria, one tuned to the Weather Channel and the other to what is called the Exelon Employee Network. On election day, both monitors were tuned to the Exelon Network. He looked at one and saw on the screen a ballot with a yes and no block. As he watched an X on the screen moved into the "NO" block to the audio accompaniment of cheering and clapping hands. Hoch was in the cafeteria for about 10 to 15 minutes and the same scene was being repeated as he left. In between there were employee related videos having nothing to do with the election. He saw the same video on a monitor in the area where employees pick up their badges.

Union Representative Brian Brennan was present at the Peach Bottom facility on the day of the election, arriving at 5:00 am. During the day, he visited the facility's cafeteria in the company of another Union representative. While there he heard applause and looked up at a TV monitor. He saw on the screen a sample ballot and then an X floating into the vote no box accompanied by applause. He and the other representative photographed what they saw.

April Schilpp is a site communicator for Exelon at Peach Bottom. She has held this position since March 2005. She is responsible for internal and external communications with employees and the public. Among her other duties, she is responsible for communications over the Exelon closed circuit TV network at Peach Bottom. On this network, she runs a daily slide show that passes on to employees information involving employment related issues as well as some human interest items involving employees. Schilpp testified that she updates the presentation daily during the week and it changes around 9 am each work day. According to Schlipp, the vote no slide ran on May 4 with a clapping sound accompanying the screen image. She testified that on that day, she cut out the sound and demonstrated on a computer how this could be done. She said the decision to cut off the sound was her idea. She also testified she may have been mistaken about the date she removed the sound. This particular slide was prepared elsewhere and sent to her by email from Limerick on May 3. She testified that this slide was shown at Peach Bottom on the Exelon network from about 9 a.m.May 4 to 9 a.m. May 5. Schlipp was instructed by the Company's campaign consultants to run the slide.

Peach Bottom employee James Logue also saw and heard the vote no presentation on TV monitors upon arriving for work early on the morning of May 5. He also testified other employ-

[22] Though I do not find their statements to employees in this regard are anywhere nearly as egregious as those made by the consultants, Norris' and Gridley's statements lent support to the flat assertions made by the consultants and reinforced their message.

ees were arriving at the same time and were able to see the presentation as well.

I credit the testimony of Brennan, Logue, and Hoch that the slide presentation was being shown with sound over the Exelon network TV monitors at Peach Bottom on May 5. Hoch remembers hearing and seeing the presentation about 11 a.m. that morning. Schlipp testified that she started the vote no presentation at 9 a.m. on May 4 and that it ran continuously until she removed the presentation about 9 a.m. on May 5. There were inconsistencies in the testimony of Schlipp, mainly related to when, if ever, she removed sound from the presentation. Hearing her testimony, I believed that she was having difficulty remembering what she actually did with respect to the vote no presentation. Hoch was a sequestered witness and seemed very sure in his testimony. I credit his testimony that the presentation was still running at 11 am on May 5. Even if he were wrong, the presentation ran at least until 9 am, hours after the election began.

In *Peerless Plywood*, 107 NLRB, 427 (1953), the Board established the captive audience rule, prohibiting "employees and unions alike . . . from making election speeches on company time to massed assemblies of employees within twenty four hours before the scheduled time for conducting an election." The vote no message ran on the Exelon network from about 9 a.m. on May 4 until about 11 a.m. on May 5, within the time proscription of Peerless. The sound portion was loud enough to be heard above the noise of the facility's cafeteria. It could be seen and heard entering and leaving the facility. The presentation clearly presented the Respondent's campaign message, "vote no." The presentation was not one prepared by Schlipp, but was given to her by management and she was told to run it. It contained sound when she got it so it was clearly management's intent that employees both see and hear it. I have found that sound was still accompanying the video message for several hours into the election day. I sustain Objection 5.

4. Objection 6 alleges that Exelon unlawfully affected the outcome of the election and interfered with, restrained, and coerced employees by engaging in electioneering close to the polling place at issue

James Logue is employed as an equipment operator at Peach Bottom. He testified that Peach Bottom has tight security and that almost all of the facility is in a protected area. To enter this area employees retrieve their badges which have radiation dose meters attached. They then go to an area facing a bullet proof glass enclosed guard house. They then stand in front of radiation exposure meters until the machines give a green light. Then they put their belongings through an X-ray machine and pass through a metal detector, much like those found in airport screening points. All of this is occurring in front of the guard house which is approximately 20 feet by 20 feet. From there the employee turns and walks parallel to the front of the guard house and passes though a turnstile which id's the employee's hand. Then they enter the protected area. Voting in the election was held in a portion of a warehouse building that is used as a gym. It is in the protected area about 150 feet from the guard house.

On most mornings there is a guard in the guard house visible to those entering to work. The guard is usually sitting at a desk doing paperwork and not observing those entering the facility. When an employee first enters the nonsecure area of the facility, there is a television monitor mounted about 8 feet up a wall. It is located in a spot usually used for exiting, though you can see it upon entering. On the day of the election Logue arrived at 6 a.m. and retrieved his badge. He heard what he called unusual music coming from the monitor and looked up. On the screen he observed a ballot with a box and the words 'vote no.' He testified that 6 a.m. is a popular time to come to work and about six or seven other employees were there waiting for their turn at the exposure meters. As Logue waited for his turn to go though the meter, he noticed Plant Manager Joe Grimes sitting on a raised bar chair in the guard house observing employees entering the facility. Logue said he could not help but make eye contact. With Grimes in the guard house was Shelly Craig, Exelon's supervisor of the guard force. He went through security and went first to his break room to get his days assignment. He then went to vote. He then exited the facility as his work that day was outside the protected area. As he left, about 7:15 a.m., Grimes was still observing those entering. Logue had never seen Grimes nor any other plant manager in the guard house before in all 21 years he has worked at Peach Bottom. Union Representative Brennan testified that he also saw Grimes in the guard room upon his arrival at Peach Bottom on election day at approximately 5:30 a.m. At the time he saw Grimes there were several eligible voters in the same security area.

On the day of the election, Grimes reported to work at 4:30 a.m. Grimes testified that he was in the guard room at various times on May 5. He testified that his reason for being there was to ensure that visitors that day, including Board officials, would be able to get to the polling place without problem. From the guard house, he was not able to see the polling place as it was in the interior of another building. He testified that he was in the guard house for more than an hour, but less than the entire morning. Company records reflect that he was there between 5 a.m. and 7:30 a.m.[23] He did not speak to employees that day other than supervisory employees and security guards. The visitors connected with the election were one Board employee and two Union representatives, only one of which entered the protected area. Grimes was also in the guard house on that day between 5 p.m. and 6:30 p.m.

Grimes testified that he was in the guard house on election day to facilitate the entry of visitors. The two visitors were both inside the protected area by 6 a.m. He stayed there until 7:30 a.m. Thus even if I accept his reason for going to the guard house early on May 5, that reason was gone by 6 a.m. Having articulated no other reason for being there, I find that his purpose was to observe employees and voters coming into the facility. Everyone who entered the facility between 5 a.m. and 7:30 a.m. that day had to pass by Grimes. It would be impossi-

[23] The same records indicate that Grimes had been in the guard house on May 5 for a total of 3 hours and 50 minutes. In the 11 months preceding the hearing, he entered the guard house 15 times. Of those 15 times, there were only 4 times his stay was for more than 10 minutes and only one was for more that a half hour.

ble to enter without the employee seeing him from a few feet, albeit behind glass, and for Grimes not to see the employee. Because Grimes did not observe employees entering the facility with any regularity, and Logue testified he had never seen him do this in 23 years, it had to make an impression on the employees. I believe and find that Grimes' actions in this regard was to convey to employees on election day that they were being watched. All the time he was in the guard house, the "vote no" presentation was being played on the Exelon TV monitors. I find his continued presence in the guard hours and continued observance of the employees entering to vote and work was improper conduct not justified by any plausible explanation. I find it unlawful and sustain Objection 6.

5. Objection 9 alleges that Exelon threatened employees with job loss and layoffs if the Union won the election

Of the 22 Radiation Protection Technicians at Limerick, 2 work as planners, planning work schedules and work packages. Dailey testified that for the 18 years he has worked in this department, these two positions have been filled by hourly RP techs on a long-term, rotational basis. In other departments, planning positions may be filled by exempt, salaried employees.

Dailey testified that in a December 2, 2004 shift meeting, RP Manager Harris told the employees that two planner positions in the department would have to become salaried positions if the Union were selected. Harris said that if that event occurred, the RP techs would have the opportunity to apply for the two positions. If none of the techs were qualified to fill the positions or if none were selected, the two techs presently filling the positions would come back into the tech pool and the two least senior techs would be laid off if they could not find another job with Respondent.

Dailey agreed with a representation by Respondent's counsel that in the representation hearing held subsequent to the December 2 meeting, the parties reached a stipulation that Exelon "had plans underway to make the planner position a permanent exempt salaried position through which people no longer rotate, and that "an hourly employee who functioned as a planner [and who] wanted to become a permanent planner . . . could apply for the job and compete for it like everybody else." Dailey then qualified his answer, testifying that there had been no discussion during the hearing regarding the possibility that RP Technicians would no longer be employed as planners and would instead return to the RP pool. The stipulation referred to deals only with the voting rights of the two planners and says nothing about a plan by the company to change its practice regarding the planner positions in the RP department.

I find that Harris unsubstantiated threat constitutes objectionable preelection conduct. No objective facts were offered to support the threatened change and the change was certainly within the control of the employer. See *Electric Hose & Rubber Co.*, 262 NLRB 186, 194, 195 (1964); *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999).

CONCLUSIONS OF LAW

1. Respondent Exelon Generation Company, LLC is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of their jobs because they supported the Union.

4. Respondent violated Section 8(a)(1) of the Act by threatening an employee with loss of prior approval to attend Board hearings pursuant to subpoena taking leave without pay because the employee supported the Union.

5. Respondent violated Section 8(a)(1), (3) and (4) of the Act by requiring its employees Cynthia Curtin, Jerome Dailey and Robert Schlegel to use vacation time to attend Board hearings pursuant to subpoena because they supported the Union.

6. By the unfair labor practices found above and by the other conduct described in Section D[24] of this decision relating to Objections 1, 2, 3, 5, 6, and 9, Respondent has engaged in objectionable conduct likely affecting the outcome of the election held May 5, 2005 and requiring that the results of the election be set aside and a rerun election directed.

7. The following unit is a unit appropriate for collective bargaining within the meaning of Section 9(c) of the Act:

> All full-time Designers, HP Technicians, I&C Technicians, Chemistry Technicians, Equipment Operators, Reactor Operators, Maintenance Technicians, Utility Technicians, Material Coordinators, Quality Verification Technicians, NDE Technicians, plant clericals at Limerick Nuclear Generating Station (Chemistry: Administrative Clerk; Operations: Administrative Clerks; Radiation Protection: Administrative Clerk; Maintenance: Technical Clerk, Administrative Coordinator; Maintenance Planning: Administrative Coordinator; I&C: Administrative Coordinator; Business Operations: Administrative Clerks), and plant clericals at Peach Bottom Atomic Generating Station (Chemistry: Administrative Coordinator; Operations: Technical Clerk; Administrative Coordinator; Radiation Protection: Technical Clerk; Maintenance: Administrative Coordinator; Maintenance Planning: Administrative Coordinator; I&C: Administrative Coordinator; Business Operations: Technical Clerks), employed by the Employer at Peach Bottom Atomic Generating Station, Limerick Nuclear Generating Station and Outage Services (East), excluding all other employees, Lead Technicians, all other Administrative Clerks, Administrative Coordinators, Senior Administrative Coordinators and Executive Coordinators, Planners, all employees in exempt pay classifications, and all employees in the Security, Training, Regulatory Assurance, Nuclear Oversight and Human Resources Departments, office clerical employees, guards and supervisors as defined by the Act.

8. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. The unfair labor practices and Objections found to have been committed are the only ones shown to have been committed.

[24] Sec. D begins at p. 17 [**Change to appropriate page no. when case is completed.**]and is captioned, "Facts and Conclusions with respect to Objections."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent is further ordered to make whole its employees Cynthia Curtin and Jerome Dailey for any losses they may have suffered by Respondent's unlawful discrimination against them, including restoring to them the vacation time charged against them to attend Board hearings in 2004 and 2005. Respondent is further ordered to post an appropriate notice, including a *Lufkin* notice.[25] It is further ordered that a rerun election be directed. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Exelon Generation Company, LLC., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of their jobs because they supported the Union.

(b) Threatening an employee with loss of prior approval to attend Board hearings pursuant to subpoena taking leave without pay because the employee supported the Union.

(c) Requiring its employees to use vacation time to attend Board hearings pursuant to subpoena because they supported the Union.

(d) Threatening to change flextime, shifts, work schedule, and overtime in the event the Union was selected as the collective bargaining representative of its employees.

(e) By implying that selection of the Union would be futile and that Respondent would not bargain in good faith.

(f) Engaging in captive audience communications within 24 hours of the election.

(g) Engaging in electioneering close to the polling place for the election.

(h) Threatening employees with layoffs or job loss if the employees selected the Union as their collective bargaining representative.

(i) in any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Make whole its employees Cynthia Curtin and Jerome Dailey for any losses they may have suffered by Respondent's discrimination against them, including restoring the vacation time they were required to use to attend Board hearings pursuant to subpoena in 2004 and 2005.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its Peach Bottom Atomic Power Station, Limerick Generating Station and Outage Services Group facilities in Delta, Limerick an Kennett Square, Pennsylvania respectively, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(e) IT IS FURTHER ORDERED that the election held May 5, 2005 in 4–RC–20940 be set aside and the case is remanded to the Regional Director for Region 4 for the purpose of directing a rerun election.

Dated, Washington, D.C. March 10, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[25] See *Lufkin Rule Co.*, 147 NLRB 341 (1964), and Sec. 11452.3 of the Board's Casehandling Manual (Part Two).

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities

WE WILL NOT threaten employees with loss of their jobs because they supported the Union.

WE WILL NOT threaten an employee with loss of prior approval to attend Board hearings pursuant to subpoena taking leave without pay because the employee supported the Union.

WE WILL NOT require our employees to use vacation time to attend Board hearings pursuant to subpoena because they supported the Union.

WE WILL NOT threaten to change flextime, shifts, work schedules, and overtime in the event the Union was selected as the collective-bargaining representative of our employees.

WE WILL NOT imply that selection of the Union would be futile and that we would not bargain in good faith.

WE WILL NOT engage in captive audience communications within 24 hours of the election.

WE WILL NOT engage in electioneering close to the polling place for the election.

WE WILL NOT threaten employees with layoffs or job loss if the employees selected the Union as their collective bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL make whole our employees Cynthia Curtin and Jerome Daily for any losses they may have suffered by our discrimination against them, including restoring the vacation time they were required to use to attend Board hearings pursuant to subpoena in 2004 and 2005.

The election conducted on May 5, 2005 was set aside because the National Labor Relations Board found that certain conduct of Exelon Generation Company, LLC. interfered with the employees' exercise of a free and reasoned choice. Therefore a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

EXELON GENERATION COMPANY, LLC